IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

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## No.

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COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

*versus*

R. C. PARSONS, RECEIVER OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS COMMITTEE OF COMMERCIAL NATIONAL BANK OF SHREVEPORT,
Respondents.

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**BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.**

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# TABLE OF AUTHORITIES CITED IN BRIEF

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There could hardly be a clearer case of "departure from the accepted and usual course of judicial proceedings" than the rendition of judgment without hearing or opportunity to be heard. Yet, that is exactly what occurred here with reference to definite and concrete issues on which the Court of Appeals undertook to reverse de-

cisions of the trial court favorable to petitioner and from which respondents had not cross-appealed. Reference to the dissenting opinion (R. 807-8) discloses express admissions that issues decided in the District Court in favor of defendant (the present petitioner) were there made after abandonment of those issues by counsel for plaintiff and intervenors.

The suit, as brought, asked relief against the present petitioner on certain definite complaints. Some of them, after admission of want of merit, were decided against the plaintiff and intervenors; others formed the subject of a decree against defendant (this petitioner). Petitioner alone appealed. There was no cross-appeal. On the contrary, the printed briefs and oral arguments of plaintiff and of intervenors—the only appellees—conceded the correctness of that part of the judgment of the District Court which had gone against them. Moreover, they conceded that the same concession had been made in the trial court. Moreover, they prayed for an affirmance of that judgment. Under those circumstances, this petitioner, as appellant, did not discuss those issues either in brief or orally. As a matter of fact, it could not have done so, because they were not before the Court.

Yet, despite this situation, the Circuit Court of Appeals assumed to enlarge the rights of appellee by reversing and remanding generally, with directions to the District Court to render a new decree not inconsistent with its opinion: an opinion which puts the District Judge in error in respect of his ruling on concrete issues conceded below and on appeal, and never appealed from.

## I.

## THE CIRCUIT COURT OF APPEALS WAS WITHOUT POWER TO ENLARGE THE RIGHT OF THE APPELLEE IN THE ABSENCE OF A CROSS-APPEAL.

As pointed out in the petition, the decree of the District Court went against plaintiff and intervenors in respect of the two asserted causes of action

(a) that the petitioner had collected interest unreasonable or usurious (R. 46); and

(b) (R. 8-9) that the one million dollar note of the old bank was without consideration, and represented no indebtedness.

The District Court decree was in favor of plaintiff and against the petitioner on the other two causes of action

(a) the claim of liability for savings on taxes, growing out of the assessment to petitioner of pledged realty, as "a fruit of the pledge"; and

(b) in the denial of petitioner's claim, as cross-complainant, for services in the administration of assets.

Petitioner alone took an appeal. No cross-appeal was attempted by plaintiff or by intervenors.

What the Circuit Court of Appeals assumed to do is correctly summarized in the last paragraph (R. 830) of the opinion refusing a rehearing:

"To recapitulate briefly: We held that savings on taxes obtained by the pledgee through use of pledged

> realty were a fruit of the pledge and belonged to the pledgor; that interest on assets charged against the old bank was usurious and should be disallowed; that appellant is entitled to a reasonable fee for its services in administering Class C assets if it earned the same by faithful and efficient services; that the cost of administering Class B assets must fall entirely upon the new bank; that the consideration for the one million dollar note failed because the pledged assets of the old bank exceeded its liabilities and there was no deficiency-liability of stockholders; that after hearing such additional evidence as may be offered, the district court should make further findings as to what if any compensation should be allowed the new bank for its services and expenses in administering Class C assets; and that the judgment should be reversed and the cause remanded generally for further proceedings not inconsistent with the opinion."

Thus, in remanding "generally for further proceedings not inconsistent with the opinion", the Court remanded with an opinion holding squarely: (a) that the interest charge was usurious, despite the decision of the lower court to the contrary, and (b) that there was no consideration for the one million dollar note, in the face of a decision favorable to the petitioner in the District Court on that score.

That "the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below" (see *United States v. American Railway Express Co.*, 265 U. S. 425, 435), is a proposition so elementary in federal appellate

practice that, without quoting therefrom, we deem it proper to refer by citation only to some of the authorities:

*United States v. Hickey, 17 Wall. 9, 13;*
*United States v. Blackfeather, 155 U. S. 180, 186;*
*Chittenden v. Brewster, 2 Wall. 191, 196;*
*The William Bagaley, 5 Wall. 377;*
*South Fork Canal Co. v. Gordon, 6 Wall. 561, 568;*
*The Maria Martin, 12 Wall. 31, 40, 41;*
*New Orleans Mail Co. v. Flanders, 12 Wall. 130, 134, 135;*
*Mt. Pleasant v. Beckwith, 100 U. S. 514, 527;*
*Clark v. Killian, 103 U. S. 766, 769;*
*Loudon v. Taxing Dist., 104 U. S. 771, 774;*
*Hubbard v. Tod, 171 U. S. 474, 494;*
*Bolles v. Outing Co., 175 U. S. 262, 268;*
*Landram v. Jordan, 203 U. S. 56, 62;*
*Peoria & P. U. R. Co. v. United States, 263 U. S. 528, 536;*
*United States v. American R. Exp. Co., 265 U. S. 425, 435;*
*Federal Trade Commission v. Pacific States Paper Trade Asso., 273 U. S. 52, 66;*
*Charles Warner Co. v. Independent Pier Co., 278 U. S. 85, 91;*
*Langnes v. Green, 282 U. S. 531, 538;*
*So. Pac. R. Co. v. United States, 168 U. S. 1, 65.*

Such cases as *United States v. American Express Co., 265 U. S. 425*, in no way weaken that rule. In fact, that decision so states. All that case held is (like *Langnes v. Green*), that wrong reasons given by a trial court for a correct decision do not justify reversal. In other words,

that appellee may urge any sound reasons in support of a decree in his favor, but is wholly precluded from attacking it. This is unbroken jurisprudence.

*Helvering v. Pfeiffer, 302 U. S. 247, 251:*

> "While a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, an appellee cannot, without a cross-appeal, attack a judgment entered below."

The statement in the opinion (R. 795) that an appeal in equity removes the entire case to an appellate court for a trial *de novo*(1) on the record and evidence, leaves out the equally as important ruling that the appellate court may review *de novo* only so much of the decision as has come within its jurisdiction by an appeal.

The assumption in the majority opinion (R. 795-6) that this rule does not apply to an equity appeal is wholly without justification. This Court has never recognized such doctrine, but on the contrary the great majority of the cases heretofore cited were equity appeals. The point is, not that the appeal is in equity, at law, in bankruptcy, or in admiralty, but that *the appellate jurisdiction of the court must be invoked by an appeal before the court has any authority to act upon the complaint.* One who considers himself aggrieved by the judgment of a trial court

(1) All the authorities, (even those cited by the Court R. 796), make plain of course that the trial **de novo**, incident to an equity appeal, means only that the case is thrown wide open on the law and the facts, insofar as the appellate jurisdiction of the reviewing court has been invoked. It has never meant that appellee may have his rights enlarged without a cross-appeal.

has no recourse, no matter what the nature of the suit may be, unless he appeal. Complaints in his brief are disregarded. Cross assignments are not permitted. The appellate court is utterly lacking in power to correct, when the aggrieved party has failed to set in motion that legal process which alone can give that court authority to correct.

The majority opinion assumes the existence of a different rule in a suit for an accounting. It is respectfully submitted that no authority may be found for such differentiation. But this suit is not merely one for an accounting. Let us look again at the record.

The complaint, it is true, does ask for a final accounting, but an accounting based upon specific and detailed complaints. It does not stop merely with setting up a fiduciary relation, the duty of accounting, and a prayer for an accounting. The Receiver was not kept in ignorance of defendant's accounting. Such accounting had been regularly had. With meticulous detail, he therefore complains only that the defendant is liable with respect to certain specific items. Though it involve repetition, we again set out the particular complaints asserted in the pleading of appellees:

Paragraph 10 avers the improper charging of taxes; paragraphs 11 and 12, the liability of the defendant because of the so-called "tax saving"; paragraph 14, the duty of the defendant to account "for all profits, fruits, rents, income or other advantages received by it through the use of the property transferred to it"; paragraphs 15 and 16, the contention with respect to the one million dollar note;

paragraph 17, liability for interest on the one million dollar note; paragraph 18 attacks the right of the defendant to the "6% on Class B Assets charge"; paragraph 19 claims that certain items of interest should be disallowed.

The prayer (R. 11) is for an accounting to "be made and filed *in accordance with the rights of the plaintiff as herein set forth*", and that as a result thereof, there be a decree that the old bank is no longer indebted to the new bank and directing a retransfer of all of the assets purported to be transferred in the agreement of December 3, 1932. The further prayer is for judgment "for such sums as may be found to be due to plaintiff bank upon the settlement of the account *in accordance with the allegations hereof*". Thus, it will be seen that the plaintiff came into court, not with a blanket suit for accounting, but upon a complaint based upon certain specific allegations which were made the issues upon which joinder was had and trial conducted.

As a result of that trial, the District Court rejected certain of plaintiff's contentions, and found in his favor upon others. The items upon which the District Court found against the defendant were those set up in the assignments of error upon which the case was briefed and argued in the appellate court.

When the defendant prosecuted its appeal, it of course made no complaint against the judgment which had been rendered in its favor. It could not appeal from the judgment it had itself successfully demanded. The appeal, as shown by the assignments of error (see R. 799), meant

only that the jurisdiction of the appellate court had been invoked, insofar as the judgment below had run against appellant. But in order properly to present such appeal to that Court, necessarily there had to be designated the entire record: this because it would have been impossible for the Court intelligently to examine into the facts upon which the decree proceeded and upon which the appellant based its claim of error, without there being before it the entire record, including the pleadings and evidence.

Plaintiff took no appeal; intervenors took no appeal, although the judgment ran against them also in respect of the matters whereon the appellate court, by reversing, enlarged their rights. The three months within which *(U. S. C., Title 28, § 230)* their cross-appeal might have been taken ran, and no effort was ever made by complainant or intervenors to invoke the appellate jurisdiction of the Court. The judgment of the District Court insofar as it had rejected the specific claims of complainant and intervenors, had therefore become final and was the property of the Commercial National Bank in Shreveport, the only appellant in the Court.

For, of course, insofar as the judgment below had denied recovery to complainant upon its several causes of action pleaded, defendant was judicially exonerated from liability. A judgment denying recovery is as much the property of a defendant as is a judgment in favor of a plaintiff the property of the plaintiff. One may be deprived of his property only by legal action under valid law.

The law here limited attack upon the judgment by complainant and intervenors to a period of three months.

> "The bar arising from the lapse of time within which an appeal may be taken is a vested right."
> *Corpus Juris, Volume 12, page 986,* and authorities cited.

If the right of the defendant to protection under its favorable decree was to have been affected, this could have been done only by cross-appeal. Complainant and intervenors had full opportunity so to do. They deliberately refused to invoke that jurisdiction of the Court of Appeals, however; because, as they had solemnly told the lower court and as they afterwards repeatedly told the appellate court, they agreed with the defendant that the District Court's ruling thereon was correct.

## II.

## ORDERLY JUDICIAL PROCEDURE IS DEPARTED FROM BY AN APPELLATE COURT WHEN IT DISREGARDS SOLEMN ADMISSIONS MADE IN THE LOWER COURT, UPON WHICH THAT COURT HAD ACTED: AND WHEN, ON APPEAL, IT IS ADMITTED BY COUNSEL THAT THE DECISION BELOW WAS CORRECT.

As pointed out in the dissenting opinion (R. 807), the brief for the Receiver (appellee) in the Circuit Court of Appeals, expressly stated:

> "At the trial of the case counsel for plaintiff stated to the court that, while still of the opinion that the charges for so-called interest were grossly exces-

> sive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. * * * No cross appeal has been filed."

Thus, as made clear in the dissenting opinion (R. 808):

> "The majority puts the lower Court in error for not doing that which counsel stated frankly they advised the lower Court there was no legal basis for doing."

Moreover, appellee's brief (R. 808) expressly admitted that the "six percent interest" charge, which the majority opinion holds usurious, was not interest at all.

> "While this charge was denominated in the contract as an interest charge, in effect it was a liquidation charge."

Thus, Judge Waller's comment (R. 809) is wholly apropos:

> "Of course the old bank did not cross appeal because of the allowance by the lower Court of that which counsel for the old bank admitted was proper under the contract when they, referring to the 6% service charge, stated to the lower Court at the beginning that 'they could find no legal basis for relief from the express provisions of the contract in respect thereto'. It is a universal rule that the lower Court will not be put in error when the errors complained of were not seasonably called to the lower Court's attention; but here the majority is putting the lower Court in error, not for alleged errors that were called to the Court's attention but for something over which all parties below were in accord, and which had the express approval of the appellee. Counsel for the appellees, being lawyers of outstanding ability and integrity, have not here urged that which the majority seeks to force them to ac-

> cept, but they have with great circumspection realized that they took no cross appeal, and that, in fact, a cross appeal from a ruling made with their consent and advice would ordinarily meet only rebuke."

The "departure from the accepted and usual course of judicial proceedings", petitioner avers is—outside of its enlargement of the rights of appellee without cross appeal—two-fold:

(a) in its holding of the trial court in error because of ruling expressly approved below by the appellee prior to the entry of judgment; and

(b) in disregarding the express admission of appellee of the correctness of the lower court's ruling.

For it is apparent that through both processes, the appellant below (the petitioner here) was entirely cut off from argument or discussion of the matters upon which the Court of Appeals reversed, when petitioner was met in that court by express and formal admission of the correctness of what the lower court had done.

(a)

So many cases in this court, and in all the other courts throughout the country, affirm the rule of orderly procedure that a litigant may not on appeal controvert the theory upon which he tried the case below, that they may not be cited in this brief without violation of the rule of this court requiring, on certiorari, that the brief be direct

and concise. The cases are cited in *American Jurisprudence*, Volume 3, page 35, under the text, § 253:

> "It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review."
>
> See also § 873 and cases cited.

*A fortiori*, seemly judicial procedure, and proper professional conduct would seem to forbid counsel on appeal departing from, and controverting express admissions upon which the trial court had acted in rendition of judgment. Counsel for appellees here, gentlemen of the bar of the highest professional standing, cognizant of their professional obligation, did not attempt to put the trial Judge in error in respect of matters upon which he had been led—at least in part—by their statements on trial. In fact, in the Circuit Court of Appeals they repeated these admissions and asserted their correctness.

In the face of these admissions, we submit, without further argument, that the appellant (the present petitioner) was done injury, irremediable except for the exercise of the supervisory power of this Court, by deprivation of opportunity to present argument on what was, not only by the absence of cross-appeal but by admission of opposing counsel, no longer a matter of controversy.

(b)

It seems to have been ignored by the majority of the court below that counsel appearing at its bar are officers of the court. They represent their clients, it is true, but their professional duty and obligation is primarily to the court.

So, when counsel for the appellees came into the Circuit Court of Appeals, and there stated plainly and unequivocally, in brief and in oral argument, that the decision of the District Court, insofar as it had run against them, was correct, there no longer could have been an issue on that score.

That admission, of course, in addition to all else that had transpired, operated as an insuperable barrier to the appellant (the present petitioner) presenting argument on these questions. For they were no longer questions; they were matters decided, not the subject of any form of controversy. Indeed, petitioner's counsel would have been justly censured by the court below had they undertaken to consume the time of the court with argument or brief upon matters admitted by opponent not to be controversial, but to have been correctly decided in the District Court, and there on their express admission.

It jumps to the eye that petitioner was, therefore, condemned in the Circuit Court of Appeals without hearing or opportunity for hearing: plainly a denial of due process.

> "The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."
>
> *Garfield v. United States, 211 U. S. 249, 262.*

## III.

## AS TO THE RULING THAT THERE WAS USURY.

If the court below were justified in decreeing an enlargement of the rights of the appellee in the absence of a cross appeal and of reversing in his favor upon matters which had been decided against him in the trial court on his concession and then admitted in the Court of Appeals to have been correctly there decided, the decision of the Circuit Court of Appeals here holding that there was usury is inconsistent with applicable decisions of the Louisiana courts. Reference to the contract (R. 15) discloses that the new bank (this petitioner) had assumed, as a debtor, all of the obligations of the old bank (here represented by its Receiver). The majority opinion admits that the liabilities were assumed, but erroneously concludes (R. 790) that the new bank became merely a guarantor of those obligations; when, as a matter of local law, it became the principal debtor.

*Isaacs v. Van Hoose, 171 La. 676.*

The obligation assumed by the new bank was, under the local law, a *stipulation pour autrui;* i. e. an obligation validly assumed toward a third party. The *Civil Code* of the State provides, Article 1890:

> "A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked."

Article 35 of the Louisiana Code of Practice expressly provides for a direct action for the enforcement of the obligation in behalf of the party in whose favor it has been contracted. The acceptance of the stipulation may be evidenced by conduct, as well as by express formal acceptance.

> *Vinet v. Bres, 48 La. Ann. 1254,* and cases there cited;
>
> *Allen & Currie v. Shreveport, 113 La. 1091 (1101);*
>
> *Peoples Bank v. Shreveport Ice & Brewing Co., 142 La. 798, 808,* and cases there cited.

It is of interest to note here that Mr. Williston (Contracts, Vol. 2, paragraph 381, page 1106) refers to Louisiana as one of the states in which the right of the third person to sue upon the assumpsit is direct and unequivocal.

No justification, therefore, exists for the ruling that the obligation of the new bank was merely that of a guarantor, and that it was therefore to advance money for the account of the old bank.

For all practical purposes, all of the debts assumed were deposits. We say this because the statement of December 2nd (R. 343) shows that there was more cash on hand than obligations, outside of deposits. The depositors continued to do business with the Commercial National Bank, but with the "in" bank instead of the "of" bank. They deposited money in the "in" bank, and they drew checks on the "in" bank. They recognized, therefore, the assumpsit by the new bank, and their continuous conduct in treating their deposits as being in the "in" bank instead of in the old "of" bank, was that complete acceptance of the *stipulation pour autrui* which, under the law of Lou-

isiana, made the obligation irrevocable in favor of each such creditor; *i. e.*, the depositors.

Because, as above pointed out, the new bank had assumed, as a debtor, all of the obligations of the old bank, it is a patent fact that it was never called upon to advance to the old bank one cent. It made the liabilities of the old bank its liabilities, and those liabilities were the deposits. When the new bank assumed these liabilities, it advanced no money. It had the depositors' money. When the depositors withdrew their money, they withdrew it from the new bank. They drew it out of cash on hand, and cash on hand represented paid-in capital, plus so much of deposits as was not invested or loaned. The new bank was a going concern, just as the old bank would have been, had its affairs not been involved through mismanagement to the extent that it could not longer function as a bank. After the contract, the old bank went out of business, irretrievably and with no hope of ever again engaging in business. As a banking institution, it was dead. No depositor thereafter dealt with it, directly or indirectly. All accounts were transferred to the new bank.

Thus the new bank neither advanced nor loaned any money to the old bank; and usury, under the law of Louisiana, can never exist except as growing out of excessive interest charged upon *a loan of money.* (See authorities later cited). The provision in the contract which the Court erroneously held to provide for a usurious charge for money loaned, appears in paragraph 5 (R. 18), which reads as follows:

> "All cash from time to time collected or realized from the corpus or principal of 'Class C' assets and

all interest and other revenue derived from 'Class B' and 'Class C' assets shall be credited to an account to be called 'Class C Assets Account', and to this account shall be charged reasonable salaries of officers and employees in collecting and administering 'Class B' and 'Class C' assets together with legal fees and other expenses properly chargeable to 'Class B' and 'Class C' assets, *and to this account shall be charged interest computed on daily balances at the rate of six percent (6%) per annum on the account or accounts carried on the general ledger and called 'Class B Assets'.*" (Italics ours).

The majority opinion assumes that the interest "was intended as compensation for the use of money to be advanced" (R. 790).

But, as we have pointed out, the contract never called upon the new bank to advance any money to the old bank and, indeed, it never made such loans. Its assumption of the old bank's liabilities carried with it definite and difficult obligations, *but none of those was to loan money* to the old bank.

When these facts are considered, and the contract correctly analyzed, the whole basis falls out of the argument that there was usury. For, if there was no loan of money to the old bank, no interest was of course charged on any loan. If no interest was ever charged upon a loan to the old bank, there could have been no usury practiced by the new bank toward the old bank.

The contract, however, does provide for a charge, "computed on daily balances at the rate of six percent per annum on the account or accounts carried on the general

ledger and called 'Class B Assets'". That charge is styled "interest", but this provision counsel for the Receiver and for the intervenors properly conceded in the trial court and in the appellate court, in their briefs and in oral argument, to be a charge for services and not interest (R. 808). This concession undoubtedly grew out of counsel's knowledge of the law of Louisiana, whose Civil Code distinctly provides that the use of inept or incorrect words in a contract does not affect its validity, or the duty of the court to determine the real and common intent of the contracting parties.

So, here, since interest, as interest, may be charged only for the actual loan of money, the word "interest" in the clause in question was a rather inept designation of the compensation agreed upon. But that fact does not affect the right to the collection of the charge so stipulated.

It was provided, in plain and unequivocal language, that the old bank should be charged with 6% per annum, computed on daily balances "on the account or accounts carried on the general ledger and called 'Class B Assets'". The Civil Code of Louisiana provides:

> *Article 1950:* "When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms."
>
> *Article 1956:* "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."

That it is the common intent, and not the literal application of words improperly used, that is sought by the courts of Louisiana see *Clement v. Dunn, 168 La. 394, 403*, and cases cited.

Moreover, the appellee has always construed the contract as did the District Court.

In invoking judicial relief, the Receiver came into court, alleging in paragraph 18 of his complaint (R. 9):

> "The charges thus made while termed 'interest', are in fact a service charge for administration and liquidation of certain assets of the old bank since said charge is based not upon any amounts paid out by the defendant bank or borrowed from it, but upon the stated book value of certain assets delivered to the defendant bank for liquidation."

And, though the majority opinion (R. 791) states that the record discloses a plea of usury, it will be noted that such plea (R. 45) was made entirely in the alternative; and that any contention upon this score was formally abandoned in the trial court and could not, therefore, be said still to have been an issue in the appellate court. This was the express admission of counsel for the appellee. On page 5 of their brief (R. 807) they say:

> "At the trial of the case, counsel for plaintiff stated to the court that, while still of the opinion that the charges for so-called interest were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereof".

Thus, not only was the judicial process invoked upon the plaintiff's interpretation of the contract that the six percent charge was not interest upon borrowed money, but the decree of the District Court rejecting such contention was made upon plaintiff's express admission.

The court below was, therefore, wholly in error in saying (R. 797) that the plea of usury "is in the record before us on this appeal"; and then holding that there was usury upon an interpretation wholly inconsistent with that placed upon the contract by the plaintiff himself.

Moreover, as a matter of local law, there never can be usury except in connection with excessive interest upon an actual loan of money. In *Bank of Louisiana v. Briscoe, 3 La. Ann. 157, 159*, the Court said:

> "The operation of this article of the Code has always been limited to loans of money. No evasion of it has ever been tolerated, but it has always been confined to its true intent, and been held not to apply to the purchase and sale of promissory notes, bills of exchange and other negotiable instruments, nor to the transfer and sale of credits."

In that case, the Court points out, page 161:

> "We do not think that the form in which the contract under consideration appears affects at all the merits of the cause * * *. The form of the contract is, therefore, immaterial; its true character, resulting from its cause and obligations, is alone important in directing our inquiries and determining its validity."

This case has been often cited, and is the settled law of Louisiana. It is the settled law of Louisiana be-

cause it is the provision of the Civil Code itself. The opinion below seeks to draw its authority from Article 2924 of the Civil Code of Louisiana, which in express terms fixes the rate of interest only in respect of loans of money.

But, in answer to a contention that usury might be spelled out of other than excessive interest stipulated to be paid upon a loan of money, the court in *Mutual National Bank v. Regan, 40 La. Ann. 17, 19*, said:

> "We do not see how this relief could be granted unless we should strike out Article 2924 of the Civil Code."

When, therefore, consideration is given to the surrounding facts and circumstances and to the local law, it must be apparent that the Court erred when it said (R. 793):

> "Appellant did not stipulate for and is not entitled to any fee, premium, or commission for assuming the obligations of the old bank. This was the consideration moving from appellant to the old bank for the good will of its business and the pledge of every asset it possessed. This was the only consideration that the old bank and its stockholders received under the contract."

Appellant did stipulate for, and consequently is entitled to compensation for assuming the obligations of the old bank. This, because such compensation was expressly agreed upon, and part of such compensation was the 6% charge on accounts represented by Class B assets. The good will of the business of the old bank was *not* a consideration moving from appellant to the old bank, *because*

*the old bank possessed no good will.* It was not even in condition to reopen its doors. It would have been a complete loss had the new corporation not assumed its liabilities. Had the old bank attempted to continue business in the face of the report of the National Bank Examiner, and the inevitable "run" had ensued, not only would it have collapsed but the economic structure of the entire territory would have been disastrously affected, with grave injury to the personal fortune of each one of its stockholders.

And, finally, it is to be borne in mind that the new bank was not called upon to advance one cent in *money* to the old bank. The unambiguous language of the contract shows what the agreement was; namely, *to assume the obligations of the old bank.* As long as the creditors of the old bank were satisfied with that assumption, looking to the new bank as the source of eventual payment, no loan of money was ever to be made. Now, who were those creditors? We repeat: they were the depositors. The position of those depositors was simply shifted by the contract, so that their deposits remained in the new bank as the successor to the old one. They were free to withdraw their deposits from the new bank whenever they saw fit. Many did see fit to withdraw: as pointed out in the dissenting opinion (R. 807) $4,000,000.00 was so withdrawn during the first few weeks after the change. But the drawing out of that money was simply the withdrawal of deposits; and, of course, was paid out of deposits. It merely represented a shrinkage in deposits. As long as a

sufficient balance was left on hand to pay withdrawing depositors, the new bank could not have been called upon to advance any of its money for any purpose.

Consequently, counsel for the Receiver correctly interpreted the agreement when they made their judicial allegation (R. 9) that this charge

> "is based not upon any amounts paid out of the defendant bank, or borrowed from it."

Under such circumstances, it is impossible to spell out usury

> "unless we should strike out Article 2924 of the Civil Code".
>
> *Mutual National Bank v. Regan, supra.*

IV.

**THE RULING OF THE CIRCUIT COURT OF APPEALS WITH RESPECT TO THE ONE MILLION DOLLAR NOTE IS INCONSISTENT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.**

Reference to the contract (R. 14) discloses that among the assets taken over by the new bank was a promissory note of the old bank in the sum of One Million Dollars, bearing six percent per annum interest. That note (R. 15) was declared to be an absolute obligation of the old bank. Its amount represents the double statutory liability of stockholders in national banks. This note was originally classed among the "Class B Assets" (R. 17) *i. e.*, those assets which the new bank took to indemnify itself against its assumption of all of the liabilities of the old bank. Later, as was held by the District Judge (R.

692), this note was transferred from "Class B Assets" to "Class A Assets," *i. e.*, those which were taken over by the new bank absolutely, and for which a present irrevocable credit was given by the new to the old bank. Thus, as pointed out by the District Judge, the transfer of this note from "Class B Assets" to "Class A Assets" reduced the amount of the assumed liabilities by an amount exactly equal to the face of the note. (See stipulation, R. 348-351).

The majority opinion below, however, holding that the note was utterly without consideration, decided that all of the interest collected on the note was usurious (R. 794), thus putting the District Judge, the counsel for the Receiver, the counsel for the intervenors, and the Comptroller of the Currency, all in error(1).

But in this respect, the decision below is squarely in conflict with applicable decisions of other Circuit Courts of Appeal: notably, with that of the First Circuit in *Trustees of Somerset Academy v. Picher, 90 Fed. (2d) 741, 744*, where the Court stated that the giving of such notes is

> "a practice frequently adopted in the taking over by one bank of another",

and that of the Fourth Circuit in *Aberly v. Craven County, 70 Fed. (2d) 52*, where it was said by Judge Parker

> "The power of the directors to make such a transfer of assets and the validity of a note given under such circumstances have been decided too often to justify further discussion of the matter."

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(1) That the note in question did represent a real obligation is expressly admitted by the Office of the Comptroller of the Currency. See letter of instructions to the Receiver (R. 531).

## V.

## WITH RESPECT TO THE SO-CALLED "TAX SAVINGS".

Eliminating the matter of compensation for administration (not presently presented), the only matter raised by the appeal was the ruling of the District Court holding petitioner liable for "tax savings" and interest. On this, the Circuit Court of Appeals affirmed, Judge Waller again dissenting (R. 810). A brief explanation of the issue is necessary.

The contract under which the assets were taken over provided (R. 14) for a conveyance to the new bank of all assets of every kind of the old institution including

> "real estate * * * and all other property and evidence of property of whatsoever nature and wheresoever located".

For further assurance, the old bank agreed to

> "execute and deliver any deed or other document, and to do any other lawful thing considered necessary or desirable to make legal the transfer of assets herein provided for and to put the title to same in Party of the Second Part".

Conformably to this obligation, deeds were executed by the Commercial National Bank of Shreveport to the Commercial National Bank in Shreveport to all realty of every description then standing in the name of the old bank, and those deeds were placed of record.

The contract had been laid before and approved by a meeting of the stockholders, wherein appeared counsel representing minority groups. That stockholders' meet-

ing expressly designated the agreement (R. 22; also 26) as "the sale of the assets of the bank", and three times in the minutes of the meeting of the stockholders appears reference to it as "agreement of sale", and again as "act of sale".

In *Phelan v. Wilson, 114 La. 814,* the Court recognized the doctrine (page 823) of innominate contracts which "yet convey ownership"; and that conveyances intended as security transfer "the legal title to the property and clothe them (i. e. the vendees) with authority to sell the same and apply the proceeds to the payment of certain debts and obligations".

That thereafter the real estate was properly assessed under the local law to the new institution is the express admission of the Receiver in his pleadings. See paragraph 12 of complaint (R. 5):

> "Defendant bank, having acquired the legal title to the property transferred to it under the contract of December 3, 1932, *and being primarily liable for the payment of taxes thereon,* did, throughout all the period of time from the date of said contract, December 3, 1932, up to the present time, in making its return to the taxing authorities * * * set up as an asset belonging to it (a) all of the real estate transferred by the old bank under the contract of December 3, 1932 and (b) the capital stock of subsidiary corporations of the old bank, the assets of which consisted of real estate acquired for debt. *The value of said real estate and capital stock was set up in accordance with the applicable law.*" (Italics ours).

Thus, at the threshold, it is plain that the old bank clothed the new bank with the apparent—the legal and record—

title to these assets, and that they were properly and legally returned, and properly assessed.

The net result, however, of the assessment to the new bank of this realty was to reduce the burden of *ad valorem* taxes to the stockholders of the new institution. This, by reason of the federal permissive statute *(U. S. Code, Title 12, §548)* relating to state taxation of national banks.

See:

*First National Bank v. Kentucky, 9 Wallace, 353;*

*First National Bank v. Anderson, 269 U. S. 341, 347;*

*Des Moines National Bank v. Fairweather, 263 U. S. 103, 106;*

*First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60.*

During the years here in question, the method of reaching capital employed in national banks for state taxes was that provided for in Act 221 of 1928, and in Act No. 6 of 1934, the provisions of which two statutes are, in this respect identical. These acts are set out in full in the Appendix to this brief. In substance (see *First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60),* they provide for assessment against the shares of stock in national banks, and the deduction from the valuation of such shares of the book value of the real estate, which was to be assessed to the bank as such, at valuations fixed by the state taxing authorities.

The cause of action declared upon, was based upon contention that the deductions thus made from the assessment of the shares of stock resulted in savings of taxes to the new bank; that such savings were "fruits of the pledge" represented by the transfer of the realty; and that consequently they were to be accounted for by the new bank as trustee. The District Judge sustained this contention (R. 50-66; also R. 685); the majority opinion affirmed (R. 786-8); the minority opinion again dissenting (R. 809-11).

Petitioner respectfully avers that the decision below is erroneous in respect of important questions of law which may often arise in the administration of affairs of defunct or embarrassed national banks, and that such decision is, in one respect, inconsistent with applicable local law, and, in another, with express decisions of this Court respecting the construction of national banking laws.

(a) **As to the Local Law.**

The original opinion of the majority of the Court below starts (R. 785) with a statement that the "correct decision upon all issues depends upon the law of Louisiana". The Court then proceeds to find (R. 786) under that law, that petitioner was liable to the old bank for the so-called "tax savings" as constituting "fruits or revenue derived from the use of the trust property". For such ruling, the Court cites *Article 3168 of the Louisiana Civil Code*, which provides:

> "The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he can not appropriate them to his own use; he is bound, on the con-

> trary, to give an account of them to the debtor, or to deduct them from what may be due to him",

and *Article 3176* of the same Code, which reads as follows:

> "The antichresis shall be reduced to writing. The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt."

But, with the utmost respect, it is submitted that the majority—as the dissenting opinion point out (R. 810)—entirely misconstrues the term "fruits" and "revenues"; such error, in turn, growing out of its failure properly to grasp the nature of the juridical root out of which the tax saving germinated. As the etymology of their terms would indicate, "fruits" are products of the thing itself: "revenues", earnings periodically arising from the thing pledged. In *Elder v. Ellerbe, 135 La. 990, 994-5,* the Court defined the term "fruits", as used in the law of Louisiana, as referring "to what is produced and reproduced from time to time, or in successive seasons", citing French commentaries to the effect "the fruits must be of things that are born and reborn of the soil".

Certainly a pledgee is liable to the pledgor for profits yielded by the thing itself, such as its increase or rents or other compensation for its use. But here, whatever saving of taxes was had was not through the use of the thing, or through its yield or increase and, consequently, was neither fruits nor revenues. The profit to the petitioner—if profit there was—did not arise out of the

pledged realty, and consequently was not something which the petitioner was equitably obligated to restore to the pledgor as issuing out of the pledge.

Nothing surreptitious was accomplished.(1) The old bank, through the actions of its directors (R. 15) and of its stockholders (R. 23) executed formal deeds to the new bank to the realty in question. Those deeds were placed of record. The complaint (R. 5) very properly admits the duty of the taxing authorities to assess to the new bank, as the owner of the legal title of record. The Deputy Comptroller of the Currency was cognizant of and approved (R. 298-301). That assessment was made. Taxes on the property were then paid by the new bank, and charged back to the old bank as part of the expense of administration. Of that, there is presently no complaint. This cost the old bank nothing. If the assessment had been in its name, it would have paid the same taxes, so that it neither gained nor lost by the arrangement. The assessment being thus properly made, and the taxes properly paid, the law of Louisiana required the taxing authorities to deduct, conformably to the permissive federal statute *(U. S. Code, Title 12, § 548)*, the aggregate of the book value of the realty from the value of the capital stock in the assessment to the shareholders of the new bank.

That was the act of the law itself operating upon a valid contract between the parties.

(1) It is admitted (R. 527) that the agreement was approved **in toto** by the Comptroller of the Currency.

For whatever earnings issued out of the real estate in the way of profits on sales, or rents, or otherwise, proper accounting has admittedly been had. No question exists as to that. The real estate, as such, earned no part of the sum sued for. The acts of the parties, dealing at arm's length, the execution of formal deeds, the placing of these deeds on record, are indisputable. The Receiver's pleadings admit the propriety of the assessment, just as did the Deputy Comptroller of the Currency (R. 301) after the matter had been discussed with him by the predecessor Receiver of the old bank (R. 298). The opinion below states that the saving "clearly does not belong to the Trustee or its stockholders", but advances no legal reason why the Receiver should be entitled to it, except its dictum that "it was a profit derived from the trust property", and "was not within the contemplation of the parties at the time the contract was made" (R. 787). The first statement is clearly erroneous; the latter equally so. Contracting parties are presumed to have contemplated the results which the law attaches to their acts. And nothing in the contract between the parties, or in the equities of the situation, declares, suggests or implies any right of the old bank to that which, without fraud, was the act of the law itself. Especially is this the case when if the assessment had been made to the old bank, it would have paid the same taxes and would have received no benefit whatever in the way of tax savings.

The importance and the novelty of this question is, in the opinion of counsel, of that nature as to suggest the propriety of the review of the lower court's decision upon this issue.

(b) **The Ruling of the Lower Court Is Inconsistent With Decisions of This Court.**

Reference to the controlling state statute (Act 14 of 1917, Secs. 1, 2 and 4 of which (the only portions here relevant) are printed in the appendix) discloses that Louisiana, in availing herself of the permission granted by the federal statute *(U. S. Code, Title 12 § 548)* to derive revenue from moneyed capital employed in national banks, has provided for taxation of the shares of capital stock of such banks to be "assessed to the shareholders at the domicile or location of the bank": such taxes to be paid by the bank direct, "and it shall be entitled to collect the amount so paid from the shareholders or their transferees".

Thus, there can be no basis for contention that the petitioner, *as a corporation,* was the beneficiary of the deduction on which the Receiver hangs his right of action.

Such cases as *Des Moines National Bank v. Fairweather, 263 U. S. 103,* make it plain that the assessment is not merely in form, but in substance, one against the shareholders and not against the bank, as such:

> "While the bank is required primarily to pay the tax on the shares, the statute shows that the payment is to be on behalf of the stockholders and that the bank is accorded ample means of enforcing reimbursement from them. It is on the stockholders that the burden ultimately rests."
>
> (Page 112, citing *First National Bank v. Kentucky,* 9 Wallace, 361; *First National Bank v. Chehalis County,* 166 U. S. 440, 444; *Covington v. First National Bank,* 198 U. S. 100, 111, 112; *First National Bank v. Adams,* 258 U. S. 362).

Petitioner's stockholders were never made parties to this suit. These persons "on whom the burden of taxation ultimately rests" were the sole parties who benefited, *i. e.*, "saved" by the assessment. The defendant in the District Court, the petitioner here, was not the beneficiary. When it paid taxes on the shares, it did so not as tax debtor, but as the conduit nominated by the state law, through which payment of taxes should flow.

The decision below entirely ignores the cited decisions of this Court.

It is respectfully submitted that such decision on an important question directly connected with the winding up of national banks, inconsistent with repeated and applicable decisions of this Court, is again one in which the supervisory jurisdiction of this Court is properly to be exercised.

## IN CONCLUSION.

For each and all of the above reasons, it is respectfully prayed that certiorari be granted.

Respectfully submitted,

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